

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

GOODMAN BALL, INC.

Plaintiff,

vs.

CLEAR WATER USA, INC.;

DENOUEMENT STRATEGIES, INC.;

MACH II AVIATION, INC.;

ESCAPE VELOCITY OF TAMPA BAY,

INC; SOLARDIESEL CORP.

Defendants.

Case No.: 3:07-CV-01148-BZ

**PLAINTIFF GBI'S REQUEST FOR
LEAVE TO FILE A SUR-REPLY TO
DEFENDANTS' REPLY FILED MAY 29,
2009; PROPOSED ORDER**

Judge: The Honorable Bernard Zimmerman

PLEASE TAKE NOTICE that Plaintiff GBI hereby requests and moves the Court for an order allowing it to file a Sur-Reply to Defendants' Reply filed on May 29, 2009.

I. INTRODUCTION

1. On December 3, 2008, Plaintiffs filed a Motion to Reopen the Case. (Doc. No. 84.)
2. On January 6, 2009, the Court granted Plaintiff's unopposed Motion. (Doc. No. 85.)
3. On May 1, 2009, Defendants filed a Motion for Relief from Order (Doc. No. 96.), and Plaintiff filed its Opposition on May 15, 2009 (Doc. No. 102.)
4. Defendant's REPLY raises new issues by attempting to argue its opposition to Plaintiff's Motion to Reopen disguised as a 60(b) motion. (Doc. No. 106.)
5. Attached as Exhibit A to this motion is a proposed Sur-Reply that briefly responds to the issues raised in Defendants' REPLY.

II. ARGUMENT

A. Legal Standards.

It is black letter law that in a motion for relief from order, a freely made decision not to appeal may not be excused by permitting recourse to Rule 60 (b)(6) as a substitute for appeal. *Polites v. United States*, 364 U.S. 426, 431 (1960). Specifically, the choice not to do something, like appeal or oppose a motion, is a risk, but calculated and deliberate, and as such, follows a free choice which cannot be relieved because hindsight indicates that the decision was probably wrong. *See id.*, citing *Ackermann v. United States*, 340 U.S. 193, 198 (1950).

B. Plaintiff GBI's Request to File a Sur-Reply Should be Granted Because Defendants' Reply Raises Issues for the First Time.

Plaintiff GBI's request to file a Sur-Reply should be granted because Defendant has attempted to use a back-door approach to oppose the underlying Order in its Reply. Specifically, the Reply argues that the Defendant has fulfilled its obligations under the Memorandum of Understanding (Doc. No. 106, pp. 2-4) which relates to the underlying Order Reopening the Case. Defendants' Reply also asserts that service of the Motion to Reopen (Doc. No. 84) was improper and that certain evidence presented is inadmissible, which relates to the underlying

1 Order. (Doc. No. 106, §§ A, C.) These issues have been raised for the first time and the Court
2 should allow Plaintiff GBI to address these issues.

3 **III. CONCLUSION**

4 For all the foregoing reasons, Plaintiff GBI respectfully requests that this Court grant
5 Plaintiff GBI's leave to file the attached Sur-Reply.

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10 LAW OFFICES OF
MICHAEL M. AHMADSHAHI

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12 Respectfully Submitted,

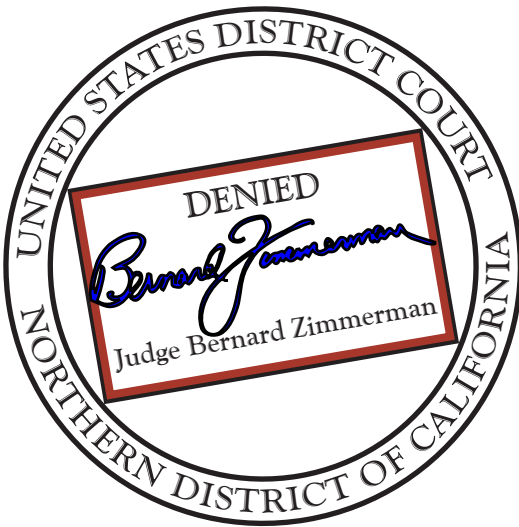
13 /S/ Shana L. Villoria
14 Shana L. Villoria, Esq.
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PROPOSED ORDER

The Court, having considered the foregoing motion, hereby grants GBI's leave to file its Sur-Reply.

IT IS SO ORDERED.

Date: August 17, 2009.



Honorable Bernard Zimmerman
United States Magistrate Judge

DENIED AS MOOT.

DECLARATION OF SHANA L. VILLORIA

I, SHANA L. VILLORIA, declare as follows:

1. I am an attorney at law duly licensed and in good standing to practice before all courts of the state of California. I am an attorney of record for Plaintiff GBI in the above-captioned matter.
2. I make this declaration in support of GBI's Request for Leave to File a Sur-Reply to Defendants' REPLY Filed May 29, 2009. I have personal knowledge of the matters set forth herein and, if called as a witness, I could and would competently testify thereto.

I declare under penalty of perjury that the foregoing is true and correct.

Date: June 2, 2009.

/S/ Shana L. Villoria
Shana L. Villoria, Esq.

CERTIFICATE OF SERVICE

I, SHANA L. VILLORIA, certify under penalty of perjury that the foregoing was served on the interested parties listed below, via the Court's Electronic Case Filing Program and/or United States Mail on June 2, 2009.

/S/ Shana L. Villoria
Shana L. Villoria, Esq.

Law Offices of Michael M. Ahmadshahi, A.P.C.
An Intellectual Property Law Corporation
Michael M. Ahmadshahi, Esq. (Bar No. 219933)
Shana L. Villoria, Esq. (Bar No. 261342)
600 Anton Blvd., Ste. 1100
Costa Mesa, CA 92626
Telephone: 714.371.4321
Facsimile: 714.371.4221
Email: mahmadshahi@mmaiplaw.com
Email: svilloria@mmaiplaw.com

Attorneys for Plaintiff,
GOODMAN BALL, INC.

Arthur H. Barens
Joe Hariton
Law Offices of Arthur H. Barnes
10209 Santa Monica Blvd.
Los Angeles, CA 90067
Telephone: (310) 557-0444
Facsimile: (310) 557-1432
Email: barenslaw@aol.com
Email: jhariton@barenslaw.com

John E. Johnson
Janelle A. Weber
Shutts & Bowen LLP
100 S. Ashley Drive, Ste. 1500
Tampa, FL 33602
Telephone: (813) 229-8900
Facsimile: (813) 229-8901

Attorneys for Defendants